Section 18

Food Service Contracts

Section 18, Food Service Contracts

Consultant, Food Service Management Company (FSMCs), and Vended Meal

Update Guide

June 8, 2026	Replaced references to *ARM Section 14a, USDA Foods Processing*. This section has been removed from the ARM and renamed to the "USDA Foods Processor Handbook." The handbook is located on the *Food Distribution Program for Child Nutrition Programs* landing page on SquareMeals, under *Policy/Handbook*.
March 11, 2026	Clarified guidance for contract term limits. Incorporated guidance from TDA's Food Service Management Companies (FSMC) Frequently Asked Questions (FAQ) document.
February 14, 2025	Clarified guidance on the following topics: - USDA Foods in vended meal contracts
May 19, 2023	Clarified guidance on the following topics: - 21 day menu cycle requirements Created new *Definitions* and *Contact Information* sections, located at the beginning of the *Administrator's Reference Manual (ARM)*. Removed definitions and contact information from this section.
September 29, 2022	Clarified guidance on the following topics: - FSMC Contract Review Form
July 28, 2022	Clarified guidance on the following topics: - Definitions - Vended meal servers - USDA Foods Reconciliation

Table of Contents

Preparing for a Food Service Contract 9
Types of Food Service Contracts 9
Consultant Contract 9
Food Service Management Company (FSMC) Contract 9
Vended Meal Contract 9
Procurement of Food Service Contracts 9
Acting on Behalf of the CE 9
Contract Negotiation 9
Cost Structure for Food Service Contracts 10
Documentation 10
Finalized Contract Before Implementation 10
Limiting Competitive Procurement 10
Meal Pricing 11
Noncompliance Caused by Contractor Actions 11
Reports 11
Texas Unified Nutrition Programs System (TX-UNPS) Contact 11
Vendor Concerns 11
Conflicts of Interest 11
Communication with Potential Offerors for a Food Service Contract 12
CE Survey of Possible Bidders for Product and/or Service Availability 12
Third Parties Acting on Behalf of the CE 12
Material Change 13
Changes Commonly Not Considered a Material Change 13
Changes That Commonly Are Considered a Material Change 13
Consultant Contract 14
Roles for a Consultant in a School Nutrition Program (SNP) 15
Appropriate Use for a Consultant Contract 15
Contract Duration 15
Operational and Management Tasks 15
Awarding the Contract 16
Program Compliance 16
Procuring a Consultant 16
Scope of Work 16
Financial Elements 16
Terms and Conditions 17
FSMC Contract 18
Issues to Consider 18
Roles for an FSMCs in a School Nutrition Program 19
Meal Planning, Preparation, and Service 19
Counting and Claiming Data 20

Procurement on Behalf of the CE 20
Responsibility for Program Compliance and Contract Management 20
Accounting and Finances 20
Calculating Meal Equivalents 21
Nonprogram Revenue Invoicing 22
Charge Policy 22
Contract Management 22
Determining Allowable Fringe Benefits 22
Administrative Review (AR) and Other Audits 22
Advisory Board 22
Agreements and Contracts 23
Civil Rights 23
Competitive Foods 23
Counting and Claiming 23
Eligibility Determination 23
FSMC Contract Review Form 24
Onsite Monitoring 24
Health and Safety 24
Meal Service 24
Procuring an FSMC 25
Acceptable Methods to Procure an FSMC 25
Cost Analysis 28
Plan for Evaluating FSMC Offers 29
Offer Evaluation Team 30
Required Solicitation and Contract Prototype 31
TDA Approval Process 31
Advertising for Offers 32
Timing of Advertisement 32
Content of Advertisement 33
Additional Required Notification for FSMC Contracts 33
Pre-Proposal Meeting 33
Elements to Include in the FSMC Solicitation/Contract 33
Certifications 33
Competitive Food Nutrition Standards 33
Compliance and Audit History 33
Contract Duration 34
Documentation 34
Facilities Management 34
Financial, Allowable Costs 34
Financial, Food Service Account 34
Financial, Invoicing 35

Financial, Procurement Practices and Preferences 35
Statement that the FSMC must provide documentation necessary to demonstrate compliance with all procurement regulations. 35
Financial, Purchasing Equipment on Behalf of the CE 35
Capital Expenses *35*
Equipment Used in the Storage, Preparation, and Delivery of School Meals *35*
Ownership of Equipment *36*
Financial, Roles and Responsibilities 36
Inventory Management 36
Meal Preparation and Service 36
Meal Service Advisory Board 36
Professional Standards 36
Protest Procedures 37
Records Retention 37
School Nutrition Funds Protections in the FSMC Solicitation/Contract 37
Bond, If Required 37
Financial Guarantees, If Required 37
Insurance, As Appropriate 37
Loss Recovery 37
Negligence 38
Recovery of Overclaims (Non-Performance) 38
Prior Program Information in the FSMC Solicitation/Contract 38
Financial Information 38
General Information on Prior Operation 38
Program Participant Demographics 39
Terms and Conditions in the FSMC Solicitation/Contract 39
Additional or Fewer Contracted Services during the Contract Period 39
Conflict Resolution 40
Contract Duration 40
Price Index 40
Federal, State, and Local Regulations 40
Logistics for the FSMC Contract Award 40
Protests 41
Signatory Authority 41
Termination 41
USDA Foods 41
Management of USDA Foods 41
Providing Credit for USDA Foods 42
Reporting USDA Foods Values 42
Removing USDA Foods from Invoiced Food Cost 42
Determining the Cost of USDA Foods from State Contracted Warehouses 43

USDA Foods Reconciliation 43
Fresh Fruit and Vegetable Program (FFVP) 43
Awarding the Contract 43
Contract Duration 44
Contract Renewal 44
Bankruptcy Procedures 44
Vended Meal Contract 44
Roles for a Vended Meal Contractor in a School Nutrition Program (SNP) 44
Contract Duration 45
Counting and Claiming 45
Meal Servers 45
USDA Foods 45
Credits, Rebates, Discounts, and USDA Foods Values 46
Responsibility for Program Compliance 46
Procuring a Vendor 46
Scope of Work 46
Financial Elements 47
Operational and Management Tasks 47
Terms and Conditions 47
Awarding the Contract 48
Responsibility for Program Compliance 48
Records Retention 48
Procurement System 48
Documentation 49
Compliance 49
Obligation of the Contracting Entity (CE) to Report Fraud, Bribery, and Gratuity Violations 49
Criminal Penalty 50
Fraud 50
Termination of the Permanent Agreement for Financial Fraud or Misuse of Funds 50

Food Service Contracts

Consultant, Food Service Management Company (FSMCs), and Vended Meal

A contracting entity (CE) may procure a food service contractor to support the CE in its food service operation. The CE is responsible for ensuring the food service contractor operates the program according to the contract and in compliance with all regulations and guidance. **Contracting with a food service contractor does not release the CE from any responsibilities for the Child Nutrition Programs.**

[NOTE: In some cases, a CE may use a written agreement to assist the CE in program operation or procurement. The guidance for food service contracts applies to agreements that achieve the same purposes.]

The guidance in this section should assist CEs in the procurement and management of the food service contracts for the following school nutrition programs (SNPs):

- National School Lunch Program (NSLP)
  - Afterschool Care Program (ASCP)
  - Fresh Fruit and Vegetable Program (FFVP)
  - Seamless Summer Option (SSO)
- School Breakfast Program (SBP)
- Special Milk Program (SMP)

If an SNP operator also operates the Summer Food Service Program (SFSP) or Child and Adult Care Food Program (CACFP), the guidance in this section will apply to FSMC contracts for those programs.

In addition to the guidance in this section, CE will find additional applicable guidance in the following *Administrator's Reference Manual (ARM)* sections:

- *Section 14, USDA Foods*
- *Section 15, Program Integrity*
- *Section 16, Financial System*
- *Section 16a, Contract Management*
- *Section 17, Procurement*
- *Section 17a, Procurement Procedures*

Information Box 1
Additional Resources

USDA Contracting with Food Service Management Companies (FSMC): Guidance for School Food Authorities Handbook

This handbook provides guidance for state agencies and school food authorities (SFA) contracting with food service management companies. Available at *https://www.fns.usda.gov/cn/updated-guidance-contracting-food-service-management*

Texas Comptroller of Public Accounts

The website for the Texas Comptroller provides information on procurement and contracting regulations that apply to state and local governmental entities. Available at *www.comptroller.texas.gov/*

Resources include the following:

- *State of Texas Procurement and Contract Management Guide*— guidance and recommendations on improving existing contract management methods and practices. Available at *https://comptroller.texas.gov/purchasing/publications/procurement-contract.php*

Texas Education Agency (TEA)

Financial Accountability System Resource Guide (FASRG) provides detailed guidance of financial accountability, including Module 3, Purchasing, for local education agencies and charter schools. Available at *www.tea.texas.gov/Finance_and_Grants/Financial_Accountability/Financial__Accountability_System_Resource_Guide/*

United States Office of Management and Budget (OMB)

2 Code of Federal Regulations, Part 200— These regulations provide detailed information on required federal procurement process. Available at *https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200?toc=1*

- *Section 17b, Buy American*
- *Section 17c Cooperative Purchasing*
- *Section 23, Food Product Documentation*
- *Section 26, Food Safety*
- *Section 27, Professional Standards*
- *Section 30, Records Retention*

Conflicting Program Regulations

CEs operating Child Nutrition Programs (CNPs) must follow federal, state, and local regulations that govern the actions of the CE. When there is a conflict between USDA regulations and regulations from other agencies, the CE must follow USDA regulations for the use of CNP funds. If other applicable federal, state, or local regulations do not conflict with USDA regulations, the CE will follow the most restrictive federal, state, or local regulations. All programs receiving federal funds are required to follow 2 CFR Part 200 unless federal legislation supersedes 2 CFR Part 200.

Education Department General Administrative Regulations (EDGAR)

CEs receiving funds through the United States Department of Education are required to follow the regulations described in the *Education Department General Administrative Regulations (EDGAR)* for those funds, which incorporates *2 CFR Part 200*. However, Child Nutrition Programs (CNPs) are required to follow USDA regulations for financial management, including procurement. If there is a regulatory conflict, CEs must follow the USDA regulations for all CNP funds (income, allowable and unallowable costs, and procurement).

Preparing for a Food Service Contract

Types of Food Service Contracts

When preparing for a solicitation and awarding a food service contract, a CE must consider the types of tasks and length of the contract before determining whether the solicitation and contract will be for a consultant contract, FSMC contract, or vended meal contract. This section provides detailed guidance on each of the following:

Consultant Contract

A consultant may be procured to temporarily provide support to a CE in areas where the CE lacks the necessary resources, skills, and/or abilities. Through the services of the consultant, the CE learns the necessary resources, skills, and/or abilities to operate an effective and compliant program.

A consultant can assist CE staff to develop strategies or skills to operate a successful and effective program. A consultant cannot be procured to operate or manage the program.

A consultant contract also cannot result in the purchase of duplicative services. If the CE has already procured the same services through another contract, the costs of the duplicative services are an unallowable cost to the nonprofit school food service account.

Food Service Management Company (FSMC) Contract

An FSMC is a commercial enterprise or nonprofit organization that may be procured to operate the program for the CE, under the CE's management.

Vended Meal Contract

A contractor or merchandiser may be procured to provide the CE with complete meals, meal components, raw materials, and information necessary for the CE to produce food production records for the meal service.

Procurement of Food Service Contracts

A CE must procure a food service contract appropriately, as described in *Administrator's Reference Manual (ARM)* sections listed at the beginning of this section.

CEs that procure food service contracts must also apply the following procurement requirements:

Acting on Behalf of the CE

Any agency, organization, group, business, food service management company, food processor, contractor, distributor, vendor, or other entity acting on behalf of a CE for any SNP programs is required to follow federal and state procurement guidance for all procurement on behalf of the CE. This includes the guidance in this section as well as the guidance in the *Administrator's Reference Manual (ARM)* sections listed at the beginning of this section.

Contract Negotiation

A CE must not negotiate with any offeror at any time when an invitation for bid (IFB) method is used. For a request for proposal (RFP), a CE may negotiate with the top responsible and responsive offerors who score above a specified score or

percentage that was pre-determined before the evaluation of the offers began. A CE may do so to get clarification about what each contractor is offering. See *Administrator's Reference Manual (ARM), Section 17, Procurement* for additional guidance on this process.

[NOTE: While this is commonly called a negotiation, it is not a true negotiation where there is give and take among those involved. Instead, it is an opportunity for the offerors to provide clarity on their offer.]

Cost Structure for Food Service Contracts

A CE cannot award or pay the cost for any contract with a cost-plus percentage of cost contract structure.

A CE cannot pay for costs that are not written into the contract as a specific amount. Increased costs, including for travel, cannot cause the total cost of the contract to exceed the total contract value.

Documentation

All third-party entities must provide adequate documentation[1] to a CE, so the CE can demonstrate compliance with all requirements, including, but not limited to, the following areas: procurement, training, food product documentation, financial, staffing, and meal service. Financial document must include accurate information on the application of credits, rebates, discounts, and USDA Foods values as income to the nonprofit school food service account.

Information Box 1

Additional Resources for Procurement

Texas Comptroller of Public Accounts
The website for the Texas Comptroller provides information on state regulations that apply to state and local governmental entities. Available at *www.comptroller.texas.gov/*

Texas Education Agency (TEA)
Financial Accountability System Resource Guide provides detailed guidance of financial accountability, including Module 3, Purchasing, for local education agencies and charter schools. Available at *www.tea.texas.gov/Finance_and_Grants/Financial_Accountability/Financial__Accountability_System_Resource_Guide/*

United States Office of Management and Budget (OMB)
2 Code of Federal Regulations, Part 200—These regulations provide detailed information on required federal procurement process. Available at *www.fns.usda.gov/es/node/73141*

Finalized Contract Before Implementation

Before a CE can implement the contract, all contract award requirements must be completed. If the contract requires TDA approval, such as FSMC contracts, TDA must provide approval before the contract is implemented. A CE cannot make retroactive payment to cover products and/or services prior to date the contract is finalized.

Limiting Competitive Procurement

For all consultant contracts, FSMC contracts, and vendor contracts, CEs must ensure that they do not limit competition through any of the following actions:

- Place unreasonable requirements on potential contractors for them to qualify to do business with the CE.
- Require unnecessary experience and excessive bonding.
- Allow noncompetitive pricing practices between contractors or between affiliated companies.
- Allow noncompetitive contracts to be awarded to consultants that are on retainer contracts.
- Allow contracts between entities when there are organizational conflicts of interest.

[1] See the *Records Retention* subsection in this section for additional information on documentation.

- Specify only a “brand name” product instead of allowing “an equal” product to be provided.
- Allow any arbitrary action in the procurement process.

Meal Pricing

CEs must establish the prices for student meals and meal service options. A contractor cannot set CE policy to establish the price for meals.

Noncompliance Caused by Contractor Actions

In the solicitation and contract, the CE’s procurement procedures and contract management processes must address how the contractor will resolve any noncompliance caused by contractor action or negligence. This requirement includes reimbursing the CE for the costs of fiscal action and required reimbursement of the nonprofit school food service account for unallowable costs and failure to accurately collect credits, rebates, discounts, and USDA Food values.

Reports

A CE employee designated by the superintendent must submit all reports. A FSMC company employee, consultant, or vendor employee can provide information or assistance to the CE in collecting report information, but a CE employee must submit all reports to TDA. Reports include, but are not limited to, the *Permanent Agreement*, claims for reimbursement, the *Verification Report (742)*, the *Policy Statement for Free and Reduced-Price Meals (Attachment B)*, and documentation required for an Administrative Review (AR).

Texas Unified Nutrition Programs System (TX-UNPS) Contact

CEs must designate a CE employee as the food service contract contact in TX-UNPS. An FSMC company employee, consultant, or vendor employee cannot be recorded in TX-UNPS as the CE contact. This requirement applies even if an FSMC employee is the Child Nutrition Director.

Vendor Concerns

If a food service contract vendor perceives unfair procurement practices, the vendor should resolve their concerns at the local level through district appeal and dispute processes. Vendors may also report information to TDA at *squaremeals@texasagriculture.gov* or *FSMC@texasagriculture.gov*.

Conflicts of Interest

It is a conflict of interest for a potential offeror to have prior knowledge of the solicitation or to assist in the development of solicitation. Prior knowledge and assistance include, but are not limited to, the potential offeror having input into any aspect of solicitation specifications and/or technical requirements, solicitation documentation, evaluation criteria, or award process.

If a CE awards a contract to a vendor that has provided information or documentation for the solicitation or contract, the costs of the contract are unallowable and cannot be paid with funds from the nonprofit school food service account.

Therefore, the CE must not (1) engage in the development of a food service solicitation and/or contract if that vendor will submit an offer for a food service contract or (2) use information that is prepared by any entity that will be submitting an offer for a food service contract.

Moreover, when a vendor assists a CE in the development of a solicitation or contract to procure additional services and/or products outside of the food service contract, the CE must not award the contract to an offeror if any one of the following conditions exists:

- The offer is submitted by a vendor that assisted the CE in the development of the solicitation.
- The offer is submitted by the parent company of the vendor that assisted the CE in the development of the solicitation.
- The offer is submitted by any subsidiaries of the vendor that assisted the CE in the development of the solicitation.

If TDA determines that a contract was awarded improperly or illegally, the CE will be required to take remedial action as appropriate. An award to a vendor involved in the solicitation process in any manner is not compliant, and the CE will be required to take remedial action as appropriate. Additionally, TDA will file a report with the Office of Inspector General (OIG).

Communication with Potential Offerors for a Food Service Contract

All information or documentation provided must be provided to every potential offeror. This includes, but is not limited to, the questions asked by any potential offerors and answers provided to question.

The CE must provide the location and method for accessing information or documentation in the solicitation. CEs often find the easiest way to distribute the information or documentation is a web-based format.

CE Survey of Possible Bidders for Product and/or Service Availability

A CE may survey prospective offerors to determine if specific products and/or services can be provided. In cases where a CE conducts a survey of potential offerors, the CE must ensure that possible offerors do not assist the CE in preparing the solicitation or contract.

Third Parties Acting on Behalf of the CE

USDA also prohibits third-party contractors that procure products and/or services on behalf of the CE from procuring the products and/or services from the third-party's parent company, subsidiary of the parent company, or other entities with a financial relationship to the third-party. These types of situations represent a real or apparent conflict of interest, limit competitive procurement, and result in the use of school nutrition funds to pay for the costs of duplicative services. **Duplicative costs are an unallowable cost to the nonprofit school food service account.**

Conflict of interest circumstances include, but are not limited to, a food service contractor purchasing from the food service contractor-owned or affiliated vendors. Moreover, when a food service contractor or a purchasing cooperative publishes a solicitation and procures on behalf of a CE , the food service contractor and cooperative cannot award a contract to the food service contractor's parent company, a subsidiary company of the food service contractor's parent company, or any entity with a financial relationship with the food service contractor or cooperative.

See the *Administrator's Reference Manual (ARM), Section 15, Program Integrity* for additional guidance on conflicts of interest.

Material Change

Any change in a contract that may have caused other offerors to respond differently to the solicitation is a material change to the contract. When there is a material change, the CE must rebid the contract. See the *Administrator's Reference Manual, Section 17, Procurement* for detailed information on material change.

Changes Commonly Not Considered a Material Change

Though every change should be considered individually, the following changes are commonly not considered to be a material change:

- The original contract included an anticipated change that was described as an option in the scope of work and/or specifications and/or technical requirements.
- Transitioning to a special provision option without substantively altering participation or operating costs.
  For Example: A school transitions from Provision 2 to CEP without a substantial revenue increase.

Changes That Commonly Are Considered a Material Change

The CE must perform a cost analysis and consult with their CE's legal counsel to determine a material change within the contract. Material changes include, but are not limited to, the following:

- Contract amendments that modify the scope or change the value of a contract in excess of the Simplified Acquisition Threshold.
- Addition of new services or assumptions to an existing contract that are not included in the current scope of work as reflected in the specifications, technical requirements, and/or terms and conditions of the contract.
  For Example: Adding any of the following meal service options: catering, a la carte sales, vended meals, convenience stores, vending machines, and concessions
- Addition of FSMC management for another program not included in the current scope of work as reflected in the specifications, technical requirements, and/or terms and conditions of contract.
  For Example: Adding another Child Nutrition Program (CNP) to the contract such as Child and Adult Care Food Program (CACFP), Summer Food Service Program (SFSP), or Seamless Summer Option (SSO)
- Transitioning to a special provision option **if** it substantively alters participation or operating costs. These transitions may or may not trigger a material change.
  For Example: A school transitions from Provision 2 to CEP **and** there is a revenue increase in excess of the simplified acquisition threshold.
- Making changes in services to the current scope of work as reflected in the specifications, technical requirements, and/or terms and conditions of contract which will alter the value or total costs for the original contract.
  For Example:
  - Changes to the formula for determining meal equivalency.

- Any change in fees or basis for fee increases not reflected in the original solicitation and contract.
- Major shift in responsibilities for the CE's staff or FSMC staff.
- Significant changes in the basis for determining guaranteed returns.
- Change to or adding elements to the option to renew the contract.
- Changes of contract terms, either in the base year or renewals.
- Changes to number of school days.
- Adding or subtracting schools in renewals that were not listed in the base year contract.
- Changes in staffing from the base year contract.

Consultant Contract

Consultant contracts provide short-term or temporary service assistance when a CE lacks the necessary resources, skills, and abilities to manage and operate the program effectively and in compliance with regulations. Though a consultant may provide assistance, the CE is still responsible for managing and operating the program.

In general, a consultant's contract should last no more than a year. In some cases, it is acceptable to extend the contract as the staff transition into implementing what was learned from the consultant. In this case, the consultant role takes the form of an advisor helping staff process and assess implementation actions.

Short-term or temporary services may include a single consultation or a series of consultations over a defined period of time, but no longer than one year.

For Example:

- A kitchen equipment specialist provides suggestions for improving the service line equipment and recommendations for an equipment replacement schedule.
- A registered dietitian provides recommendations related to students with medical accommodations, new recipes, and recommended menu items for unpopular meals.

[NOTE: For small or rural CEs, consultant contracts are also used when budgets and staff limitations do not support a wide range of specialized skills. However, in these cases, a consultant's contract still cannot include implementing or managing the day-to-day operations of the program.]

Before procuring a contract for a consultant, the CE should also consider if its regional education service center (ESC) can provide technical assistance at no cost to the CE for the needed services. There may also be other CEs that have the same need. CEs may form cooperatives to share the costs for these types of services. A CE may also establish an agreement with another CE to access these services through an employee of the other CE. In these agreements, both CEs will contribute to cover the costs of the employee's salary.

The CE must also ensure that a consultant contract does not result in the purchase of duplicative services. If the CE has already procured the same services through another contract, the costs of the duplicative services are an unallowable cost to the nonprofit school food service account.

Roles for a Consultant in a School Nutrition Program (SNP)

Where the services provided are not of a continuing nature, the CE may procure the services of a consultant temporarily while the CE builds staff capacity or develops a plan for implementation. If the services provided by the consultant continue over an extended period of time, the CE must reevaluate whether the consultant is meeting the CE's needs to implement the program. In these circumstances, TDA recommends that CEs contact their ESC to determine if the ESC can provide the services at no charge.

Consultant contracts may be used as described in the following circumstances:

Appropriate Use for a Consultant Contract

When there is a lack of resources, skills, or abilities to perform a required service or action, including, but not limited to, a regulatory change that the CE is not prepared to implement, the CE may procure a consultant to gain access to resources and develop staff skills and abilities to achieve or maintain compliance.

When tasks to be performed can be accomplished in a short period of time and the services can be provided more economically by a short-term, i.e., cost effective, consultant instead of a direct hire, the CE may procure a consultant. Cost effective in this case means a lower cost to the CE.

If the activities in this contract include program operation or management duties, the CE must reevaluate its consultant's solicitation and contract and either remove those duties or issue a solicitation for an FSMC contract.

Contract Duration

A consultant's role is intended to be short-term and temporary. A contract length of no more than one year with no renewals is a best practice.

If a consultant or series of consultants are procured to address long-term issues, the CE is not using the consultant services as allowed. Instead, the CE is likely using a consultant in an FSMC capacity and, therefore, must procure an FSMC if the CE is not ready or chooses not to transfer these responsibilities to its own staff.

After the final renewal, the contract must be rebid. If a CE allows a consultant contract to exceed this limitation, the costs of the contract are unallowable to nonprofit school food service account.

[NOTE: Since a consultant contract is intended to have a duration of short period, it will be unusual for a consultant contract to have a duration of four years or for there to be a rebid.]

Operational and Management Tasks

A consultant role cannot perform operational or management tasks. A consultant's contract may be used to support the CE's staff in performing operational and management tasks. When a consultant assumes operational and management roles, it has become an FSMC. If the consultant services include implementing or managing the day-to-day operations[2] of the program, a food service management contract must be used instead of a consultant's contract.

[2] Day-to-day operations include, but are not limited to, menu planning, inventory management, food production records, and common operational tasks.

If a CE allows a consultant contract to be used to perform operational and management tasks, the cost of the consultant's contract is an unallowable cost to the nonprofit school food service account.

Awarding the Contract

The consultant contract must be awarded to the contractor that is the most responsive and responsible to the solicitation[3] with price as the primary consideration as described in the CE's written procurement procedures. See the *Administrator's Reference Manual, Section 17, Procurement* for more information on awarding the contract.

Program Compliance

The CE cannot delegate its responsibility to operate and manage program compliance with all applicable federal, state, and local regulations. The CE is responsible for ensuring that the activities described in a consultant's contract are appropriate for this type of contract, that is, the activities do not involve program management or program operation.

Procuring a Consultant

A CE must procure a consultant's contract appropriately as described in *Administrator's Reference Manual (ARM)* sections listed at the beginning of this section. When procuring a consultant contract, regardless of the contract amount, the CE's solicitation and contract must include specifications outlining the services requested. Because specifications are required, **the micro-purchase method is not appropriate for procuring consultant contracts.**

In the solicitation and contract, the CE should include, but is not limited to, the following information and requirements at a minimum:

Scope of Work

A consultant contract must clearly define the scope of work to ensure that correct type of contract has been awarded:

- Statement of the objectives to be achieved with measurable indicators of when the objectives have been met and progress milestones.
- Qualifications or technical specifications necessary to provide the services under the contract.
- Explanation of the types of issues the consultant is expected to address.

Financial Elements

A consultant contract must address the following issues at a minimum:

- Process for submitting invoices, verifying accuracy of invoices, and paying invoices.
- Explanation that the offer to be submitted is for a set price,[4] i.e., the offer must include a statement for the total costs for the contract.

[3] If the micro-purchase method is used, a formal written solicitation is not required.
[4] A consultant's contract cannot be awarded to an offeror that has submitted a cost-plus percentage or cost-plus added expenses. All costs to be charged for the contract must be included in the offer.

Any costs that exceed the total amount of the contract are unallowable costs to nonprofit school food service account. If additional services are needed, a new solicitation must be issued, and a new contract must be awarded.

If travel or other types of expense costs are included in the total cost of the contract, those expenses must be outlined in the offer with a maximum cost for each type of cost for the duration[5] of the contract. Travel costs and other expenses cannot be added in addition to the total cost of the contract.

Consultant payments cannot exceed the amount of the total cost of the contract. If a contract has a renewal option, the cost of products or services cannot increase in a contract renewal year unless the change is based on a cost index or a planned expansion of products or services.

[NOTE: Changes to the cost of may occur in two circumstances:

1. The solicitation and contract include a change in cost based on the Yearly Percentage Change in the Consumer Price Index (CPI) for All Urban Consumers, as published by the US Department of Labor, Bureau of Labor Statistics, Food Eaten Away from Home. If this index is used, the total costs must also be decreased as determined by the index and may be increased as determined by the index.
2. The solicitation and contract include a description of anticipating increase or decrease in the product or services to be provided by the consultant. However, use of this option is not intended to create a long-term contract. Consultant contracts are intended to be temporary contracts for a short period of time.

Terms and Conditions

The terms and conditions of the contract address general provisions, definitions for terminology, renewal options, protests, termination, and other standards inherent to the contract.

[NOTE: As a best practice, CE's may consider a provision stating that any silence, absence or omission from the contract specifications must be regarded as meaning that only the best commercial practices are to prevail, and that only materials (food, supplies, etc.) and workmanship of a quality that would normally be specified by the CE is to be used. This provision should be contained in both the IFB/RFP and the contract.]

The terms and conditions for the contract must address, but are not limited to, the following issues:

- Responsibility of the CE to manage the contract.
- Process for addressing conflicts in the contract.
- Statement of the expected timeline for the contract duration.
- Length of the contract and options for renewal.
- Terms and conditions for terminating the contract.

[5] A consultant contract has a duration of one year. Any renewal of the contract is also for one year.

FSMC Contract

CEs may use an FSMC to operate the food service program or specific elements of the food service program on behalf of the CE.[6] An FSMC may be a commercial enterprise or a nonprofit organization.

CEs may only contract with a FSMC vendor from *TDA's Food Service Management Company Approved Vendor List*.[7]

Issues to Consider

Whether a CE is considering the use of an FSMC for the first time or evaluating its current use of an FSMC, the CE should consider the following issues:

1. What method of providing food service best meets the CE's goals and objectives?
    - What are the goals for the program?
        - Customer service?
        - Educational activities such as nutrition lessons, school gardens, or farm to school activities?
        - Financial?
        - Local wellness policy activities?
        - Nutrition?
    - What the measurable objectives for meeting each goal?
    - What are the financial considerations for program operations?
    - What other elements of program operation are important to the CE?
2. What type of services does the food nutrition program provide?
    - How many reimbursable meals—lunch, breakfast, snack, and summer—are served each year?
    - What is the average daily participation (ADP) by site?
    - What other meal service activities does the CE provide?
        - Catering?
        - Special events?
        - Fundraisers?
        - Other Activities?
3. What is the current cost of operating the food service program and income for the program?[8]

    Income

        - What is the reimbursement the CE receives by program operated—lunch, breakfast, snack, and summer—and in total?

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6 If an NSLP CE operates a Child and Adult Care Food Program and/or Summer Food Service Program, there may be additional regulations that applied for the use of an FSMC to operate the program.

7 Available at *www.squaremeals.org*.

8 The annual Financial Report submitted to TDA will provide some financial information, but the CE should work with the CE's financial manager to explore income and costs more thoroughly. TDA also provides the *Budget Tool* at *www.SquareMeals.org* which will help the CE collect the data needed to conduct a full financial analysis of the school nutrition program.

- What income does the CE receive for other food service program activities?
- What income does the CE receive for credits, rebates, discounts, and USDA Foods values?

Costs

- What are the costs incurred for operating the program?
  - Food
  - Labor
  - Supplies
  - Equipment
  - Indirect costs
  - Employee benefits
  - Storage of USDA Foods
  - Processing of USDA Foods
  - Other items?

4. What are the reasons the CE is considering changing to FSMC operation?
   - Cost?
   - Staffing challenges?
   - Operating challenges?
   - Other issues?
5. What elements of program operation does the CE feel an FSMC can manage more effectively than the CE?
   - General program management?
   - Meal Service?
   - Menu planning?
   - Procurement?
   - Staffing?
6. Other than meal program operational changes, are there other impacts if the CE changes to FSMC operation?
   - Employees losing positions?
   - Other school groups or organizations that are served by the CNP?

CEs may get additional assistance from their education service center (ESC) child nutrition specialist and may also find contacting other CEs of similar size to learn about their experiences with self-operation and/or FSMC operation helpful.

Roles for an FSMCs in a School Nutrition Program

The CE may include the following roles for FSMC Staff:

Meal Planning, Preparation, and Service

- Menu development
- Preparation of meals
- Service of meals

- Maintain food production records
- Health and safety requirements
- Receipt and use of USDA Foods, including maintaining all required records
- Inventory management

Counting and Claiming Data

- Operate the point of service (POS) system
- Collect and report data for meals served to the CE
- Maintain and provide counting and claiming data to the CE

Procurement on Behalf[9] of the CE

- Procure necessary food and supplies

  [NOTE: If CEs do not delegate food procurement to the FSMC, the CE must ensure they are not charged a rate that includes this function.]
- Assist CE in procurement of USDA Foods processing
- Maintain records on procurement, including, but not limited to, all documentation related to credits, rebates, discounts, and USDA Foods values

The FSMC contract may also stipulate that the assigned tasks for the FSMC are different for each of the child nutrition programs that are covered by the contract.

Responsibility for Program Compliance and Contract Management

The CE cannot delegate its responsibility to operate and manage the program in compliance with all applicable federal, state, and local regulations. **It is the responsibility of the CE to monitor the FSMC contract and ensure that all regulatory requirements are met.**

Even though the FSMC solicitation /contract will describe specific responsibilities for the FSMC, the CE still maintains overall responsibility for program operation and for specific actions as described in regulation.

- If a responsibility is not included in the solicitation and contract scope of work, the responsibility remains with the CE.
- If a responsibility is assigned to the FSMC, the CE is still responsible for ensuring that actions taken on its behalf are compliant with all requirements.
- If the FSMC assumes responsibilities not described in the original solicitation and contract, performing new responsibilities may be a material change and require the FSMC solicitation/contract to be rebid.[10]

The CE is responsible for the following operational tasks:

Accounting and Finances

The CE must retain control and overall financial responsibility of the nonprofit

[9] These requirements are commonly referred to as *pass through entity* requirements.
[10] See the *Administrator's Reference Manual, Section 17, Procurement* for additional information on material change.

food service account. As such, the CE must ensure that all financial transactions are compliant with requirements, including, but not limited to:

- Ensure nonprofit school food service funds are only used for allowable costs.
- Accrue all income to the nonprofit school food service account and that FSMC income reports include income broken down by source, type, and category of meal or food service.
- Retain responsibility for the overall operation of food service programs, including financial requirements. This includes limiting FFVP administrative costs to 10 percent of the overall grant, if applicable.
- Ensure the accuracy of counting and claiming.
- Ensure the accuracy of bills and invoices, including credits, rebates, discounts. [NOTE: All meals must meet requirements for reimbursable meals and be billed accordingly. CEs may not round program meals. Any non-reimbursable meals served must be claimed as non-program meals and billed as meal equivalents.]
- Ensure the CE receives all credits, rebates, discounts, and USDA Foods values, if applicable. These funds must be credited to the nonprofit school food service account.
- Ensure that the FSMC provides the documentation necessary to report program and nonprogram costs and revenue as well documentation for the required program/nonprogram cost and revenue proportion calculation.

Calculating Meal Equivalents

A "meal equivalent" is a standard unit of measurement used to calculate what FSMCs will be paid for non-program sales (à la carte, catering, concessions, adult meals).

To calculate meal equivalents, CEs must first obtain the current Meal Equivalency Factor (MEF), which is defined by TDA. The current MEF is listed on the *Food Service Management Companies* page on Squaremeals.org.

The following formula is used to calculate the total meal equivalents count:

Non-program revenue sales	÷	Meal Equivalency Factor	=	Total Number of Meal Equivalents

Round the result **down** to the nearest whole number.

Once the total number of meal equivalents is calculated, CEs can determine what FSMCs will be paid for non-program sales. A fixed price rate for meal equivalents (called the "Non-program Meal Equivalent Price") will be stated in the approved contract. The following formula is used to calculate total non-program meal equivalent charges:

Non-program Meal Equivalent Price	X	Total Number of Meal Equivalents	=	Total paid to FSMC for non-program meals

All non-program revenue must be converted to meal equivalents using the most current MEF **and** the MEF formula provided by TDA. If any other formula or figure is used, this is unallowable and CEs should work with their FSMCs to correct discrepancies for the current school year.

Nonprogram Revenue Invoicing

All nonprogram meals and nonprogram revenue must be aggregated monthly using the formulas above. Rounding is not permitted at any step other than determining the number of meal equivalents, and rounding up is **never** permitted. Invoices must reflect the individual aggregate totals and the invoice amounts.

Charge Policy

CEs must maintain a charge policy that addresses alternate meals, which details best practices for providing meals to students who are temporarily unable to access typical meal service. A copy of this policy must be provided to the FSMC and/or made available during the pre-proposal meetings or as part of their RFP documents.

The expectations of this policy must be incorporated into the operations plan of the FSMC proposals, including how the alternate meals will be charged to the CE.

For example: the district's charge policy provides the student with a cheese sandwich and juice as an alternate meal. The cost of this must be determined and considered part of non-program revenue.

For more information on charge policies, see *Administrator's Reference Manual (ARM), Section 19, Meal Pricing*.

Contract Management

The CE must retain control over operating and managing all aspects of the program, which includes administrative tasks performed via TDA's online contract management system.

FSMC employees **may not** be given any user role access in this system.

Determining Allowable Fringe Benefits

Meals served to adults are not reimbursable; however, at the discretion of the CE, meals can be served to school nutrition program employees at no cost as a fringe benefit that is considered an allowable cost. For more information, see *Administrator's Reference Manual (ARM), Section 19, Meal Pricing*.

Administrative Review (AR) and Other Audits

During an Administrative Review (AR), the CE retains responsibility for providing documentation to TDA, planning onsite observations, and resolution of findings and corrective action. While the FSMC will be involved in preparing and providing information to the CE for an AR or other audit, the CE is responsible for all responses to TDA. Further, the CE is responsible for any unallowable costs or fiscal action resulting from the AR.

Advisory Board

The CE must ensure that an advisory board composed of parents, teachers, and students to assist in menu planning is established and maintained. TDA suggests the Board meet at least twice during the program year to plan Fall/Winter and Spring/Summer menus.

[NOTE: FSMCs may serve as a member of the Board—however, they may not attend

meetings that discuss menus for a solicitation. To comply with procurement laws, the FSMC (including affiliated companies or contractors) is also prohibited from requesting information from this meeting. Any FSMC participation in any part of the procurement process would prohibit the FSMC from being selected for the award, consistent with 2 CFR §200.319(b).]

The Advisory Board is distinct from the Student Health Advisory Committee (SHAC), which is a group appointed by the school district to strengthen the connection between health and learning.

Agreements and Contracts

The CE must retain responsibility for all contractual agreements entered into in connection with the operation of the program. This includes, but is not limited to, the following:

- Retain signature authority on the TDA Permanent Agreement with TDA and compliance with the Permanent Agreement.
- Retain signature authority for the CE's *Policy Statement for Free and Reduced-Price Meals Attachment B: Meal Count/Collection Procedure(s)*.
- Retain signature authority for all tasks completed in TX-UNPS.
  [NOTE: In the space provided for the CE to record the CE's contact for the FSMC in TX-UNPS, the name recorded must be a CE employee. It cannot be an FSMC employee.]
- Retain responsibility for processor agreements and contracts.
- Retain oversight to ensure that all third-party contracts are compliant with all regulations.
- Submit reports, including claims for reimbursement, the *Verification Report (742)*, and other reports required by TDA or USDA.

Civil Rights

The CE must ensure that the FSMC complies with the procedures established by the CE for referring any civil rights complaints to the CE.[11]

Competitive Foods

The CE must ensure that the FSMC is compliant with Competitive Food Nutrition Standards (also called smart snacks) as described in A*dministrator's Reference Manual (ARM), Section 22, Competitive Foods*.

Counting and Claiming

The FSMC may maintain and provide counting and claiming data to the CE. However, the CE is responsible for submitting claims and for ensuring the accuracy of meal counts prior to claim submission.

Eligibility Determination

The CE must conduct all eligibility and verification activities related to free or reduced-price meal eligibility.

[11] See *Administrator's Reference Manual (ARM), Section 3, Civil Rights & Confidentiality* for more information on the required actions when there is a civil rights complaint.

FSMC Contract Review Form

The CE must ensure the FSMC operates the program according to the contract and in compliance with all regulations and guidance. The CE must review the FSMC's operation of the program once per semester for at least one site using TDA's *Food Service Management Company (FSMC) Contract Review Form*.[12]

Onsite Monitoring

CEs with more than one school must conduct an annual onsite review of each school prior to February 1st of each school year to observe the school's counting and claiming procedures. This includes any schools where an FSMC operates; CE staff must conduct the required onsite reviews. See A*dministrator's Reference Manual (ARM), Section 20, Counting & Claiming*.

Health and Safety

The CE must ensure all applicable health and safety certifications regulations are met, including, but not limited to, the following:

- Ensure the development and use of a Hazard Analysis Critical Control Point (HAACP) plan.
- Ensure compliance with all state and local health inspection regulations.
- Ensure the safe and appropriate storage of all foods, commercial products.

Meal Service

The CE must retain control of the quality, extent, and general nature of food service for program and nonprogram foods and meals. Namely, CEs must develop the 21-day cycle menu utilizing the required advisory board.

Once approved by TDA, CEs may **NOT** alter the menu during the first 21 days of service. Failure to follow through on the 21-day menu will result in unallowable costs. The FSMC must implement the 21-day cycle menu as procured and agreed upon in the initial contract.

> [NOTE: The FSMC may NOT participate in development of the initial 21-day menu cycle. If a CE requires assistance with meal pattern compliance, ESC representatives can provide technical assistance.]

After the 21-day cycle, the FSMC may change or vary the menus for any program with prior written approval from the CE and utilizing feedback from the Advisory Board. FSMCs must document and justify any substitutions and retain this documentation for the applicable records retention period. CEs must approve menus no later than two weeks before service.

Other CE meal service responsibilities include, but are not limited to, the following:

- Ensure compliance with applicable meal pattern.
- Determine prices to be charged for meals.
- Ensure the incorporation of USDA Foods into meals to the greatest extent possible. FSMCs may not decline to use USDA Foods.
- Ensure meal service operational practices are compliant with requirements, including, but not limited to, offer versus serve (OVS).

[12] Available at *www.SquareMeals.org*.

- Verify receipt of credits, rebates, discounts, and USDA Foods values.

Procuring an FSMC

A CE must procure an FSMC contract appropriately as described in *Administrator's Reference Manual (ARM)* sections listed at the beginning of this section. In this section, the term *solicitation/contract* is used to reference the TDA prototype combined solicitation and contract.

- An FSMC contract must be fixed price. Cost-plus-a-percentage-of-cost and cost-plus-a-percentage-of-income contracts are prohibited by USDA.

  [NOTE: The fixed meal rate must account for **all** business expenses. FSMCs should consider staffing, employees transferring between the CE and the FSMC, equipment, and other concerns to ensure an accurate offer.]

- Fee increases are not allowable unless indicated in the solicitation/contract. A fee increase must only be based on a cost index[13] or an anticipated growth or decrease in services that is described in the solicitation. Any information regarding potential fee increases must be available to all potential offerors at the outset of the procurement action through the final contract award.

- Full and open competition must be maintained in all procurement actions.

FSMCs **cannot** assist in any manner with contract or renewal document(s). CEs should contact their Education Service Center representative for technical assistance in completing solicitation/contract documents.

[Exception: the FSMC must provide the methodology for renewal if a fee increase or decrease is agreed upon by both parties. The CE must review and ensure the methodology is accurate before submitting to TDA for review. All fee increase negotiations must take place prior to this submission.]

Acceptable Methods to Procure an FSMC

In Texas, CEs may use one of two methods to procure an FSMC: (1) invitation for bids (IFB) or competitive sealed bid method or (2) request for proposals (RFP) and must use the TDA prototype solicitation/contract for this purpose. See the *Administrator's Reference Manual, Section 17, Procurement* for more information on formal procurement methods.

[13] Texas CEs must use the Yearly Percentage Change in the Consumer Price Index (CPI) for All Urban Consumers, as published by the US Department of Labor, Bureau of Labor Statistics, Food Eaten Away from Home

Invitation for Bids (IFB) (Also called competitive sealed bid)	**Request for Proposals (RFP)** (Also called competitive proposal)
Pricing	
– Contract must be fixed price.	– Contract must be fixed price.
Method Design	
– Expectations—Are the scope of work and specifications, technical requirements, and terms and conditions well defined and measurable? – Evaluation—Is there an indication of the method by which the offeror demonstrates that it has met the specifications, technical requirements, and terms and conditions? – Offers—How does the CE ensure that offers are publicly opened, and the process for opening offers is described in the solicitation/contract? – Contract Award—How will the contract be awarded to the most responsible and responsive offeror that submits the lowest cost offer?	– Expectations and Evaluation—Are the scope of work and specifications, technical requirements, and terms and conditions clearly defined, and is the CE allowed to score criteria for factors in addition to price? – Contract Award—What is the method for the contract to be awarded to the most responsible and responsive offeror with price as the primary consideration? – Offers—Even though offers do not have to be publicly opened, what is the process for opening offers that will be described in the solicitation/contract?
Questions to Consider	
– Scope of Work—Is the CE able to clearly define or describe the programs to be operated, products, and services the FSMC will provide and describe the roles and responsibilities for the FSMC and CE, and costs the FSMC will cover? – Competition—Are there multiple entities or companies that are able to make an offer?	– Technical Skills—Does the CE possess the technical skills necessary to develop the written evaluation and scoring criteria, complete a review of the responses received to evaluate, and score the proposals as specified in the solicitation, and negotiate with offerors? • Strong knowledge of procurement and experience with contract negotiation? • Knowledge of Child Nutrition Program (CNP) regulations, including allowable and unallowable cost provisions? • School food service administration and operation management? • Financial management of a nonprofit food service account? – Evaluation and Scoring Criteria—Does the CE have a process in place to document communication about the evaluation and scoring criteria in the solicitation/contract, pre-determined cut-off score for responsive offers, evaluation, and award of the contract?

Invitation for Bids (IFB) (Also called competitive sealed bid)	**Request for Proposals (RFP)** (Also called competitive proposal)
Advantages	
– Revenue and Cost—How will the CE accurately estimate program revenue and contract costs? – Billing and Payments—How will the CE describe how the payment transactions are limited to the monthly contract fee? – Simplified Monitoring—How will the CE conduct onsite monitoring for compliance: 21-day cycle menu and meal pattern, health and safety regulations, program operation, credit for the value of USDA Foods, and status of the nonprofit school food service account for revenues and expenses? – Economic Cost Adjustment—Will the CE tie changes in contract costs to the Yearly Percentage Change in the Consumer Price Index (CPI) for All Urban Consumers, as published by the US Department of Labor, Bureau of Labor Statistics, Food Eaten Away from Home? [NOTE: If cost adjustments are tied to the CPI, market price variability will not significantly impact the cost of the contract.]	– Responsibilities—How will the CE control of the weight or score for each of the evaluation criteria, so the evaluation criteria can be used to ensure that the elements in the offer related to the key FSMC responsibilities are emphasized? – Pricing—How will the CE ensure that price is the primary factor in the evaluation? – Economic Cost Adjustment for Fixed Price—Will the CE tie changes in contract costs to the Yearly Percentage Change in the Consumer Price Index (CPI) for All Urban Consumers, as published by the US Department of Labor, Bureau of Labor Statistics, Food Eaten Away from Home? [NOTE: If cost adjustments are tied to the CPI, market price variability will not significantly impact the cost of the contract.]

Invitation for Bids (IFB) (Also called competitive sealed bid)	Request for Proposals (RFP) (Also called competitive proposal)
Disadvantages	
– Precise Descriptions—How does the CE ensure that the scope of work, specifications, technical requirements, and terms and conditions provided in the solicitation/contract are well written so that offerors are able to write offers that meet the needs of the CE?	– Monitoring Costs—How does the CE address the issue that monitoring costs may be higher because of number of areas that must be monitored: 21-day cycle menu and meal pattern, health and safety regulations, advisory board, record keeping, allowable costs, Buy American provision, third party procurement, USDA Foods values, and credits, rebates, discounts for other purchases? – Essential Skill and Experience—How does the CE prepare staff who do not have sufficient knowledge, skill, and experience in procurement, allowable costs, negotiation, program operations, and financial management to conduct the process? Will it be necessary for the CE to hire experts to finalize the terms and conditions of the contract? [NOTE: Attempting to negotiate the final terms and conditions without needed expertise may result in a fully enforceable contract that fails to meet regulatory requirements. Moreover, because an administrative review or other audit may result in fiscal action for noncompliance, staff that lack knowledge, skill, and experience may not ensure that responsibilities are assigned in a way that limits the financial burden on the CE.] – Poorly Defined Responsibilities—How will the CE prevent additional costs caused by poorly defined FSMC responsibilities? How will the CE ensure that the contractor's responsibilities are clearly defined, and key performance goals are met? – Final Terms and Conditions—How will the CE ensure that the final contract maintains the scope of work, specifications, technical requirements, and terms and conditions communicated in the original solicitation/ contract?

Cost Analysis

Before issuing a solicitation for an FSMC contract, a CE must conduct a cost analysis to establish an expectation of the cost. Cost analysis may be accomplished in various ways, including the review of the CE's income and costs over a period of time, market prices, and similar contracts.[14]

[14] The annual *Financial Report* submitted to TDA will provide some financial information, but the CE should work with the CE's financial manager to explore income and costs more thoroughly. TDA also provides the

The CE must have sufficient information upon which to project the total anticipated cost of the contract. Since fee adjustments may not be permitted, any change in fees or basis for fee increases not reflected in the original solicitation and contract would constitute a substantive or material change to the contract which would require that the contract be rebid.

[NOTE: Changes to the cost of may occur in two circumstances:

1. The solicitation and contract include a change in cost based on the Yearly Percentage Change in the Consumer Price Index (CPI) for All Urban Consumers, as published by the US Department of Labor, Bureau of Labor Statistics, Food Eaten Away from Home. If this index is used, the total costs must also be decreased as determined by the index and may be increased as determined by the index.
2. The solicitation and contract include a description of anticipating increase or decrease in number of students, campuses, nutrition programs, or meal service options.]

Plan for Evaluating FSMC Offers

The CE must have a plan to ensure that procuring an FSMC contract is a well-run and fair process. The CE should develop its plan for evaluating offers as it develops the solicitation.[15] While an IFB plan for evaluation will have fewer factors to consider, the CE should carefully plan the evaluation of the IFB offers as well as the RFP offers.

The criteria for awarding the contract must be included in the solicitation. The following criteria are commonly used in contract evaluation:

- Price/Cost (total cost of proposal submitted, must be the primary consideration)
- Management plan (demonstrates FSMC's plan and personnel for how services identified in the solicitation are proposed to be accomplished)
- Experience of FSMC, reference letters, etc. (includes total business experience as well as with CEs of similar size operating Child Nutrition Programs including references of these CEs)
- Financial Condition/stability, business practices
- Accounting and reporting systems
- Personnel management and professional standards plan
- Procurement-specifically the quality of the food to be purchased
- Promotion/Marketing in school food service
- Involvement of students, staff, and others
- Pre-proposal presentation evaluation (if applicable)
  If the CE includes vendor presentations as part of the optional pre-bid meeting, the CE must provide expectations for the presentations to all potential proposers. The CE must include the evaluation of the presentations in their evaluation criteria with a value of no more than 10 points.

TDA primarily recommends methods such as issuing a Request for Information (RFI), market research, and benchmarking to gather specific details from vendors to help develop specifications for a solicitation. It is the CE's discretion whether to tour an FSMC-contracted food service operation during the procurement planning phase. Care must be

Budget Tool at *www.SquareMeals.org* which will help the CE collect the data needed to conduct a full financial analysis of the school nutrition program.

[15] See *Administrator's Reference Manual (ARM), Section 17, Procurement* for additional guidance on evaluation and cost as the primary consideration in awarding a contract.

taken to ensure fair and open competition and avoid creating an unfair advantage for any potential offerors, which would result in an unallowable contract. However, even if the CE tours an FSMC operation during the procurement process, CEs may **not** utilize this tour as an evaluation criterion.

See the *Administrator's Reference Manual, Section 17, Procurement* for more information on awarding the contract.

Offer Evaluation Team

Assignment of the roles and responsibilities for developing the evaluation

- What staff members or other persons currently have the knowledge and expertise to evaluate the offers?
- What kind of knowledge and expertise is needed to evaluate the specifications and technical requirements?
  - Who has that knowledge and expertise? Establish the standards for the evaluation/rubric tools? Create evaluation/rubric tools? To evaluate?
  - Do members of the team need additional information before beginning to evaluate the offers?
- How many members does the evaluation team need to both complete the work and ensure that there is a fair process?
  - How many offers does the CE expect to receive?
  - How long will it take a person to review the offer?
- Who has to approve the contract before it is formally awarded?
  - What actions need to be taken to get necessary approvals?
  - Who will take these actions?
  - Who will monitor the process to ensure that all approvals are obtained?
- How will the CE communicate the outcome of the solicitation to all offerors?
  - Who will develop the appropriate notification documentation? Sign the documentation? Send the notification documentation?

Information Box 3

Examples of Evaluation Criteria Point/Percentage System

CEs may use an appropriate evaluation point system. The most commonly used options are to use points or to use a percentage.

Criteria	Amount to Be Awarded	
	Option to Use Points	**Option to Use Percentage**
• Price/Cost—Primary Consideration	25	20%
• Management Plan—FSMC's Plan for Accomplishing Goals Presented in Solicitation	20	15%
• Experience of FSMC—Total Business Experience, Experience with CEs of Similar Size, Experience Operating Child Nutrition Programs	10	5%
• Financial Condition/Stability, Business Practices	20	15%
• Accounting and Reporting Systems	20	15%
• Personnel Management and Professional Standards Plan	20	10%
• Quality of Food to Be Procured	15	10%
• Promotion/Marketing in School Food Service	10	5%
• Stakeholder Involvement—Students, Staff, and Others	10	5%
Highest Possible Total	**140 points**	**100%**

Required Solicitation and Contract Prototype

CEs must use the TDA prototype to procure an FSMC. USDA strongly recommends that CEs obtain legal counsel in the development of solicitations and contracts when procuring an FSMC.

TDA Approval Process

Process for the CE to take the following required actions before releasing its FSMC solicitation/contract:

1. Notify TDA of the CE's intent to contract with a FSMC.
   TDA will provide information the CE will need to complete the process.
2. Use the TDA prototype solicitation/contract.[16]
   FSMC-developed contracts and amendments are not allowed.
3. Submit the prepared solicitation/contract to TDA for approval at least two weeks prior to the first advertising date.

[16] Available at *www.SquareMeals.org*.

Approval for Renewal

4. Submit appropriate documentation to TDA for approval of the contract renewal prior to the submission deadline.

   An FSMC contract may be renewed up to four times. However, the contract must be rebid if there is a material change[17].

All proposed solicitation/contracts must be submitted to TDA before the posted deadline. For a complete list of submission deadlines, refer to the *Food Service Management Companies* page on Squaremeals.org.

TDA will review the documents within 30 business days of receipt. However, if the required documents are not submitted accurately, TDA will return them to the CE with instructions. When the CE resubmits them, the 30 business days reset.

Once the CE has determined which vendor they want to award the contract to, the selection must be submitted to TDA for approval to award and execute by the dates listed on the *Food Service Management Companies* page on Squaremeals.org. Once TDA has approved the award, the SFA must sign and return all executed contracts to TDA by the stated deadline.

The CE's FSMC contract and/or renewal packet must be approved, in writing, by TDA before the start of the contract year. If the FSMC contract or renewal has not been approved by TDA and a signed copy of the FSMC contract has not been submitted to TDA, the CE (1) cannot claim reimbursement for meals served under FSMC operation and (2) any cost associated with an FSMC contract is unallowable.

Advertising for Offers

CEs must provide enough postings to ensure that there is broad distribution of the advertising announcement and allow sufficient time for offerors to respond to the solicitation/contract.[18] **In addition to public notice, the CE must also distribute the solicitation to all vendors on the FSMC Vendor list.[19]**

While there is no required amount of time for advertising activities in USDA guidance,[20] CEs must ensure that they advertise to the widest possible audience across a period that is sufficient for offerors to create and submit their offer.[21]

Timing of Advertisement

Because of the complex nature of FSMC solicitations, releasing the advertisement at least 45-60 days before the offer due date will allow the contractor sufficient time to review, develop, and submit a response.

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17 See *Administrator's Reference Manual (ARM), Section 17, Procurement* for additional guidance on material change.

18 See *Administrator's Reference Manual (ARM), Section 17, Procurement* for additional guidance on advertising.

19 Available at *www.SquareMeals.org*.

20 The Texas Education Agency (TEA) also has procurement guidance that may apply. As long as TEA guidance is not in conflict with USDA guidance, CEs may use that guidance.

21 The Texas Education Agency (TEA) guidance allows for shorter period for advertising than USDA recommends. While USDA does not require 45-60 days, CEs that do not allow enough time for FSMCs to prepare an offer are limiting competition. USDA regulations do not allow CEs to take actions that limit competition.

[NOTE: If the CE receives a small number of offers, the CE should review the timing of its release to ensure that the timeline was sufficient for offerors to respond to the solicitation.]

Content of Advertisement

The CE should have a procedure or process that ensures broad advertising of the solicitation. Advertising must include how the potential offeror may obtain the complete solicitation, method for submitting an offer, information concerning a pre-bid meeting (if applicable), time and place for opening offers, summary of evaluation criteria, and processes for awarding the contract.

Additional Required Notification for FSMC Contracts

The CE should have a procedure or process that ensures that the CE will send the FSMC solicitation/contract to the vendors listed on TDA's *Food Service Management Company Approved Vendor List*.

Pre-Proposal Meeting

CEs may also hold a pre-proposal meeting for FSMCs, which is optional but highly recommended. If planning a pre-proposal meeting, CEs should prepare to share information from the meeting with all vendors.[22]

If opting out of the meeting, CEs must still provide the same operational information to all approved Texas FSMC vendors.

Elements to Include in the FSMC Solicitation/Contract

Certifications

Statements[23] that the FSMC will comply with the following requirements:

- Suspension and debarment method and appropriate documentation
- Lobbying
- Non-collusion or certification of independent price determination[24]
- Civil rights compliance[25]

Competitive Food Nutrition Standards

Description of the FSMC and CE responsibilities for compliance with the Competitive Food Nutrition Standards and the retention of related documentation demonstrating compliance with all regulations.

Compliance and Audit History

Description of objective criteria used to evaluate previous compliance and audit history. CEs will evaluate the criteria consistently based on the defined parameters. CEs can access compliance and audit history for each vendor operating in Texas on the *Food Service Management Companies*

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22 See the *Administrator's Reference Manual (ARM), Section 17, Procurement* for additional guidance on this topic.

23 See *Administrator's Reference Manual (ARM), Section 17, Procurement* for additional information on acceptable method to meet certification requirements.

24 See the Texas Education Agency (TEA) website to obtain a copy of TEA's financial manual and the forms TEA provides for this purpose. CEs may use applicable TEA forms that accomplish the USDA requirement.

25 See *Administrator's Reference Manual (ARM), Section 3, Civil Rights & Confidentiality* for additional information on requirements related to civil rights.

page under "FSMC Performance Review" (located on Squaremeals.org). If further clarification is needed, contact TDA at *school.operations@texasagriculture.gov*.

CEs will also provide their protest procedures to ensure transparency in the RFP process.

Contract Duration

Statement that the contract is for one-year, July 1 to June 30. The CE may add a renewal option for up to four additional one-year contracts.

Documentation

Description of methods and frequency the FSMC will provide documentation to the CE so the CE can demonstrate compliance with all requirements.

Facilities Management

Description of the expectations for managing facilities, including, but not limited to, the following:

- Cleaning
- Extermination or pest control
- Maintenance of meal preparation and service areas
- Repairs
- Trash removal
- Other tasks as appropriate

Financial, Allowable Costs

Statement describing the methods to identify allowable and unallowable costs. The FSMC must use one of the following methods:

1. Identify each cost submitted for payment and indicate whether each cost is allowable or unallowable

   or

2. Exclude all unallowable costs from billing documents and certify that only allowable costs are submitted for payment.

Financial, Food Service Account

Statement that all revenues and profits must be retained exclusively by the nonprofit school food service account[26] and that the FSMC must provide all necessary documentation to the CE to demonstrate compliance with financial requirements, which includes, but is not limited to, sufficient information for the CE to understand each cost charged through the contract.

[26] There are two common types of accounting and billing systems that a CE may use: (1) cash basis, billing for goods and services at the time of purchase and (2) accrual basis, billing when the goods and services are actually used. The accrual basis of accounting is the preferred method because it measures the benefits received from purchases. Cash basis billing can distort this measurement by generating overstated expenses and an understated account balance at the time of purchase, and the reverse situation at other times. The CE can correct such distortions only by making adjustment entries. If the FSMC does not use the purchased goods at the same rate from month to month, the CE must recalculate the adjustment entry each month.

Financial, Invoicing

Specific directions on the method for the following actions:

- Methods for the FSMC to submit invoices.
- Information on payment processes.
- Required documentation to support invoices and payments.
- Requirements related to credits, rebates, discounts, and USDA Foods values as well as necessary documentation to demonstrate the accuracy of these payments.

  [NOTE: Invoices must include itemized costs and any rebates and discounts, whether commercial foods or USDA Foods.]
- Frequency of payments after invoices are received—monthly, prorated monthly, or other frequency.

Financial, Procurement Practices and Preferences

Description of the CE's expectations for how procurement will be handled which includes the following information:

- Indication of the types of procurement the FSMC will provide for the CE.

  In all cases, if the FSMC solicitation/contract indicates that the FSMC will perform procurement on behalf of the CE, the FSMC must provide procurement as indicated. In no case can the CE contract with two different entities to provide the same service(s)—this is called duplicative services. The costs of duplicative services are unallowable to the nonprofit school food service account.

  Moreover, the FSMC must follow the requirements for conflicts of interest described in this section and in *Administrator's Reference Manual (ARM), Section 15, Program Integrity*.
- Requirements related to the processing of USDA Foods.
- Local preferences and expectations.

Statement that the FSMC must provide documentation necessary to demonstrate compliance with all procurement regulations.

Financial, Purchasing Equipment on Behalf of the CE

In the FSMC fixed-meal rate contract, if the FSMC purchases equipment on behalf of the CE, the following guidance must be used:

Capital Expenses

Purchases of equipment $10,000 or more require prior approval from the CE and TDA.[27]

Equipment Used in the Storage, Preparation, and Delivery of School Meals

Contracts should describe the appropriate authorizations and forms required for TDA and the CE to approve the purchase of equipment to be used in the storage, preparation, and delivery of school meals.

[27] Use the capital expenditure form in TX-UNPS for this purpose.

Ownership of Equipment

CEs retain ownership of all equipment purchased or acquired with program funds for use in the food service program.

Financial, Roles and Responsibilities

Description of the role and responsibilities for both the CE and FSMC related to accounting and finances. These descriptions should be designed to ensure that the CE is able to monitor all transactions for accuracy. This includes, but is not limited to, statement that the CE be provided all documentation required to demonstrate compliance with all regulations.

- Counting and claiming
- Management of ticket sales
- Nonprogram food including a la carte, catering, vending, and special events services
- Point of service system expectations

Inventory Management

Description of the FSMC's and CE's responsibilities for managing the program's inventory of food (including USDA Foods) and supplies. This includes ensuring that all food is stored safely and the most cost-effective use of USDA Foods.

Meal Preparation and Service

Explanation of the FSMC and CE responsibilities for the preparation of meals and service of meals. This includes, but not limited to, the following issues:

- Food production records and other food product documentation
- Health and safety, including any expectations for sample menu items to be refrigerated and tested in the event of an outbreak of food borne illness, if applicable[28]
- Meal pattern requirements
- Menu planning (21-day menu cycle)
- Nutrition programs under contract
- Use of USDA Foods
- Inventories, including USDA Foods

Meal Service Advisory Board

Description of the method for creating an advisory board, frequency of meetings, and roles and responsibilities associated with the advisory board.

Professional Standards

Description of requirements for compliance with professional standards for training and hiring of a director and staff as well as maintaining documentation to demonstrate compliance.

[28] Retaining food samples for this purpose is an optional requirement. If adopted, (1) food samples are typically maintained for a 48-hour period, but may be kept for a longer period, and (2) requirements related to labeling, dating, and storage will need to be included.

Protest Procedures

CEs must include their protest procedures to ensure transparency in the solicitation process.

Records Retention

Description of the CE's expectation for the retention of documentation that demonstrates compliance with program operational and financial regulations. The CE should require that all records be kept on the premises of the CE.

School Nutrition Funds Protections in the FSMC Solicitation/Contract

Bond, If Required

Description of any type of bond(s) that the CE requires and time of submission, if applicable[29]. CEs may require payment bonds, performance bonds, and bid guarantees.

USDA has rescinded its previous guidance that bonds are required for all non-construction contracts more than $50,000. Instead, each CE must evaluate the products and/or services to be procured and determine if a bond is needed to safeguard any possible loss of funds.

[NOTE: Many contracts have financial guarantees. These guarantees may serve the same purpose as a bond.]

Financial Guarantees, If Required

Statement that stipulates financial guarantees for meeting fiscal goals as specified by the CE. Food service contracts may contain language stipulating that the FSMC guarantees to meet fiscal goals specified by the CE. Any guaranteed return promised by the FSMC must remain in the nonprofit school food service account.

- If the contract contains such guarantees, the contract should also contain language that ensures that the FSMC bears responsibility for failure to meet those goals. Guaranteed fiscal goals or returns cannot be contingent upon multi-year contracts as FSMC contracts are for duration of one year with the option of up to four one-year renewals.
- When an option for contract renewal is considered, the CE should specify in the original solicitation the CE's expectations of the guarantee for each renewal year option and if changes in the guarantee will be allowed.

Insurance, As Appropriate

Description of the CEs requirements related to insurance coverage. For insurance costs to be allowable, they must be specified in both the solicitation and contract.

Loss Recovery

Statement of the FSMC's liability for financial losses. Contracts typically offer two options to address FSMC liability. The CE must include one of the following options in the solicitation/contract:

1. Reimburse the CE for the loss without limit

[29] For NSLP programs, requiring a bond is local decision. For NSLP CEs operating the Summer Food Service Program, a bid bond and performance bond are required as outlined in 7 CFR 225.15(m)(5-7).

or

2. Reimburse the CE with limits equal to the management fee or a specified ceiling.

Contracts should also address the length of time the CE can seek recovery of losses. A CE should seek recovery of any losses for a period of time corresponding to the CE's period of liability (contractual and legal period of liability).

Negligence

Statement that communicates liability for damage caused by negligence. CEs should exclude any contract term or waiver of liability statement for FSMC damage to equipment or facilities caused by negligence.

Recovery of Overclaims (Non-Performance)

Statement that the FSMC pay the CE for any overclaims assessed by TDA due to FSMC negligence or noncompliance with regulations, including overclaims based on review or audit findings. This liability should correspond to either the five-year record retention period for public and charter schools or three years for nonprofit private schools, other organizations, and residential child care institutions (RCCIs).

Prior Program Information in the FSMC Solicitation/Contract

Financial Information

Description of CE's prior revenues and operating expenses, and related information. This includes, but is not limited to, the following:

- Total program income for the prior year.
- Total program expenses for the prior year.
- Prior and expected practice for subsidizing program operations with general funds.
- Staffing requirements including number of employees, approval of child nutrition director, insurance requirements, management of staff, and responsibility for employee benefits.

[NOTE: Contracts may have provisions against cross-hiring. Cross-hiring refers to the hiring of staff by one party to a contract when such employees are employed by the second party to the contract. Terms and conditions related to cross-hiring need to describe when an employee is no longer employed (retirement, resignation, or termination) and when an employee may cross-hire and how employee costs will be transferred from one party to the other party. Without such provisions, changes to contract provisions for handling personnel costs not included in the scope of the original solicitation and contract may represent a material change when the FSMC services are modified to include such changes. Cross-hiring provisions by either the CE or the FSMC should be reviewed by the CE's legal counsel to ensure compliance with federal, state, and local labor laws.]

General Information on Prior Operation

Information on general program operation, including, but not limited to, to the following:

- Food preparation facilities (all sites prepare food versus one central kitchen)

- Meal prices for students and adult meals
- Meal service hours at each site
- Methods of meal service (operator-served or buffet/self-service, salad bars, etc.)
- Number of current employees, including status (full-time or part-time), salaries, and benefits, as applicable
- Number of school food service sites including nutrition programs operated
- Number of serving days, including a school calendar that includes holidays and no school days for students
- Type and value of nonprogram foods and meals to be offered (catering or fundraising)
- Current federal reimbursement rates

Program Participant Demographics

Information on CE's demographics. Description of the demographics of school and program participants, including, but not limited to, the following:

- Anticipated student growth or loss and/or additional or reduced service locations
- Description of student age/grade for meal patterns required
- Educational programs available that will also receive services (pre-kindergarten, half-day kindergarten, adult education centers, alternative schools, or technical programs)
- Indication of number of students enrolled and the average daily participation (ADP)

Terms and Conditions in the FSMC Solicitation/Contract

The terms and conditions of the contract address general provisions, definitions for terminology, renewal options, protests, termination, and other standards inherent to the contract.

[NOTE: As a best practice, CE's may consider a provision stating that any silence, absence or omission from the contract specifications must be regarded as meaning that only the best commercial practices are to prevail, and that only materials (food, supplies, etc.) and workmanship of a quality that would normally be specified by the CE is to be used. This provision should be contained in both the IFB/RFP and the contract.]

The terms and conditions for the contract must address, but are not limited to, the following issues:

Additional or Fewer Contracted Services during the Contract Period

Description of any anticipated changes to the meal service operation during the one-year contract plus four options to renew. To increase the value of the contract or expand the FSMC contracted services during any year, the CE must include a description of expected changes in student population, number of schools, programs to be offered, or other meal service options in the solicitation and contract. This allows all potential offerors to have the same information before submitting an offer.

Conflict Resolution

Description of the CE's process for resolving contract conflicts. CEs are responsible for navigating contractual issues; neither TDA nor ESCs may provide legal advice, formal letters, or legal guidance regarding an FSMC contract.

Contract Duration

Statement that the contract is a one-year contract. The contract may be renewed for up to four additional one-year time periods as specified in the solicitation and contract.

[NOTE: If the option for a contract renewal is not stated in the solicitation and contract, the existing contract cannot be renewed.]

Price Index

Statement that describes if the CE will allow an adjustment to the contract fixed meal rate when a contract is renewed using the Yearly Percentage Change in the Consumer Price Index (CPI) for All Urban Consumers, as published by the US Department of Labor, *Bureau of Labor Statistics*, Food Eaten Away from Home. If this option is used, the price of the contract must also decrease if the cost index indicates a decrease.

CEs may accept proposed meal rates or CPI increases/decreases over two decimal places. TDA will allow up to four decimal places in the computation of rates and fees—however, rounding up to allow for two decimal places is not allowed.

If a CE opts to renew an FSMC contract with this statement, the FSMC must present a calculated annual CPI growth percentage based on the formula issued by the Bureau of Labor Statistics, posted monthly. The methodology for the CPI increase or decrease must be submitted with all renewal documentation. TDA will review the CPI presented and approve accordingly.

The latest CPI for acceptable use for renewals can be found on the *Bureau of Labor Statistics* website: *https://www.bls.gov/news.release/cpi.nr0.htm*. [NOTE: CEs are not required to permit an additional CPI increase.]

Federal, State, and Local Regulations

The solicitation/contract must include a requirement that the FSMC must be compliant with all federal, state, and local regulations specific to protecting program funds.[30]

Logistics for the FSMC Contract Award

Description of key dates associated with awarding the FSMC contract, including, but not limited to, the following:

- Approval process milestones for contract award.
- Dates offers will be opened, evaluated, negotiated, and awarded.
- Location if the offers are to be opened publicly.

[30] The list of applicable federal regulations is listed in *Administrator's Reference Manual, Section 17, Procurement*.

- Pre-bid meeting, if applicable. The CE cannot designate the offer due date less than two weeks after the pre-bid meeting.

Protests

Explanation of the method the CE will use to address protests.

Signatory Authority

Description of the CE's approval authority for this type of contact.

Termination

Explanation of the terms and conditions for terminating the contract—Regulations require that any contract in excess of $10,000 must address termination for cause and convenience, including the manner by which it is affected and the basis for settlement. In addition to the provision of termination for cause, CEs may also want to include a termination for convenience provision that provides adequate advance notice that would permit the CE sufficient time to arrange alternate food service if the FSMC exercises this clause.

USDA Foods

CEs are solely responsible for USDA Foods as USDA Foods entitlement is provided to the CE, not the FSMC. Any decision regarding processing, direct deliveries, or DoD must be approved by the CE. . The CE should disclose these decisions in solicitation documents so the FSMC is aware of how USDA Foods will support the planned menu.

For more details about USDA Foods, see *Section 14, USDA Foods*.

The following must be included in the solicitation/contract:

Management of USDA Foods

Descriptions of the CE's expectation of the FSMC for managing USDA Foods, including, but not limited to, the following:

- Handling, storage, and accounting for the USDA Foods inventory. It is critical that the CE specify whether the FSMC handles storage and receiving of USDA Foods.
- Ordering USDA Foods in coordination with CE.
- Previous use of USDA Foods.
- Processing of USDA Foods.
- Quantities/types of USDA Foods available or ordered for the upcoming year.
- Requirement to use USDA Foods ordered for the CE.

If the FSMC contract ends (terminated by either party or not renewed), the FSMC must return all unused donated beef, pork, and processed end products and all other unused USDA Foods in which they provided credit to the CE. The value of other unused USDA Foods shall be based on the market value of all USDA Foods received for use in the food service. The market value shall be provided to the CE by TDA. Upon termination of the contract, the CE must ensure that the FSMC has credited the CE for the

value of all donated foods received for use in the meal service in a school year or fiscal year.

Providing Credit for USDA Foods

Description of how the FSMC will provide credit to the CE for USDA Foods according to the following parameters:

- The FSMC must provide credit to the CE when the product arrives in the State contracted warehouse available for use in the meal program.
- **When the SFA orders products from the Department of Defense (DoD) Fresh Fruit and Vegetable Program,** the FSMC must provide credit to the CE when the product arrives and is in possession of the CE, whether the product is stored in the CE's warehouse, kitchen, or the FSMC facility.
- **When the CE further processes USDA foods**, the FSMC must provide credit to the CE when the final product is available to the CE, whether the product is at the state contracted warehouse, district warehouse, kitchen, or the FSMC facility.

Reporting USDA Foods Values

Description of value pass-through method the FSMC will use when USDA Foods processed end products are used. The FSMC must report the credit for UDSA Foods values on the billing invoice submitted to the CE for payment.

The FSMC must use the value pass-through method specified in the solicitation and contract and must credit the value of USDA Foods received to the nonprofit food service account.

Reporting requirements include the following elements:

1. Specified method for routine reporting and payments at an interval that allows the CE to track and verify the accuracy of values paid and owed to the CE.
   [NOTE: The FSMC must provide a report to the CE demonstrating all payments for USDA Foods values at the end of the year. However, a report at the end of the year may not allow the CE sufficient time to verify that all values have been paid accurately before a contract terminates. TDA recommends that CEs require these reports at least quarterly if not monthly.]
2. Retention of all documentation related to credits, rebates, discounts, and USDA Foods values.
3. Providing documentation upon request to the CE, TDA, USDA, or another authorized agency.

Removing USDA Foods from Invoiced Food Cost

Statement that USDA Foods will not be included in food costs. To ensure that the FSMC does not include USDA Foods when computing the food costs billing, the CE must include controls in the contract for differentiating between USDA Foods and commercially purchased foods in the inventory records and invoices for payment. Contract terms to help the CEs ensure that its food cost billings do not include charges for USDA Foods are included in the TDA RFP

and Contract prototype. All USDA Foods, including bonus USDA Foods, received for the CE during the contract period must be accounted for; CEs may also require separate reporting by the FSMC of USDA Foods used during the billing cycle.

Determining the Cost of USDA Foods from State Contracted Warehouses

CEs should use TDA's cost management tool to determine the value of Direct Delivery USDA Foods at state-contracted warehouses. Published each November, this tool utilizes the average price USDA paid for a material in the prior year. The tool is a streamlined way to determine the values of allocated, reallocated and bonus USDA Foods that may not be associated with a requisition in WBSCM. The link to the tool can be found at: *https://squaremeals.org/Programs/Food-Distribution-Program-for-NSLP/Resources*

USDA Foods Reconciliation

The CE must conduct a reconciliation at least annually (and upon termination of the contract) to ensure that the FSMC credited the CE for the value of all USDA Foods received for use in the CE's food service in the school or fiscal year, including the value of USDA Foods contained in finished end products.

Reconciliation is based on the received (not allocated) value. Because of USDA value changes, the reconciliation may not balance to the penny. CEs are encouraged to track monthly but must be able to provide TDA with the annual reconciliation during an Administrative Review and the FSMC contract renewal period. The CE may also use the USDA Foods annualized value as another tool to track reconciliation value.

The reconciliation process is much easier to manage if conducted monthly. However, the contract and solicitation must stipulate that the FSMC shows the total value of USDA Foods both purchased and received for the specific billing period.

Fresh Fruit and Vegetable Program (FFVP)

Administrative costs for the FFVP to operate an FFVP must not exceed 10 percent of the overall grant. When a CE includes FFVP operation in an FSMC contract, the CE must ensure that this financial requirement is met. See the *Administrator's Reference Manual (ARM), Section 12, Fresh Fruit & Vegetable Program* for additional guidance on allowable costs for this program.

Awarding the Contract

The FSMC contract must be awarded to the contractor that is the most responsive and responsible to the solicitation with price as the primary consideration as described in the CE's written procurement procedures. See the *Administrator's Reference Manual (ARM), Section 17, Procurement* for more information on awarding the contract.

However, selected proposals must not be **overly** responsive—in other words, providing services or benefits that are valuable but beyond the scope of the solicitation. Overly responsive proposals must be disqualified to promote fair competition.

For example: if an FSMC's proposal offers to provide a scholarship, which is not included in the original solicitation, the offer is overly responsive and must be disqualified.

Contract Duration

An FSMC contract may be a short-term or long-term method of managing or operating the program. The contract may be awarded for up to one year, July 1 to June 30, and renewed for four additional one-year periods before a new solicitation is required. An FSMC contract may only be renewed if the specifications, technical requirements, and terms and conditions of the original contract are still in place.

Contract Renewal

The CE must notify TDA of the CE's intent to renew the contract each year of the remaining four years of the contract by submitting the following documentation to TDA for approval by the deadline listed under "Renewal Documents" on the *Food Service Management Companies* page on Squaremeals.org:

- **Renewal Contract Amendment,** including language that the CE has elected to renew the contract with the FSMC for the upcoming school year.
- **TDA Contract Renewal Checklist** (with all supporting documentation required), available at *www.SquareMeals.org*.

An unsigned Renewal Contract Amendment and completed Contract Renewal Checklist with all required documents must be submitted and approved by TDA prior to execution. CEs may accept proposed meal rates or CPI increases/decreases over two decimal places. TDA will allow up to four decimal places in the computation of rates and fees—however, rounding **up** to allow for two decimal places is not allowed.

CEs should follow local procedures—for example, school board approval processes—for renewal. However, a district's governing body may not approve a renewal contract prior to TDA's review and approval.

Bankruptcy Procedures

If the FSMC under contract to provide NSLP and/or SBP meals files for bankruptcy, the CE must contact TDA immediately to inform the agency of the bankruptcy. TDA will take the following actions:

- Review the bankruptcy documentation along with other issues that might have an impact on the FSMC's ability to comply with contract terms as appropriate and
- Remove the FSMC from the FSMC vendor's list unless the FSMC can provide a required performance bond.

[NOTE: CEs cannot impose any additional criteria or assurances (for example, bonds) on a FSMC regardless of a contract's value solely due to Chapter 11 status.]

Vended Meal Contract

CEs may use a vended meal contract to procure services which allow the CE to operate the program efficiently.

Roles for a Vended Meal Contractor in a School Nutrition Program (SNP)

Vended meal contractors may be procured to perform the following tasks:

- Prepare complete meals, meal components, or raw materials meals according the menu specifications provided by the CE, including ready-to-serve meals, heat-and-serve meals, ready-to-prepare meals, and raw ingredients.
- Provide menu choices from which the CE may choose meals, food, and beverage items to be served.

- Deliver meals, meal components, or raw ingredients at designated times to designated locations.
- Provide documentation that demonstrates that the prepared meals or food and beverage items delivered meet the program requirements as indicated in the contract. This would include providing product labels and other appropriate documentation to demonstrate that specific food and beverage items meet the meal pattern or Competitive Food Nutrition Standards. In all cases, it is the CE's responsibility to maintain food product records that demonstrate that meals served meet the meal pattern.

Contract Duration

The contract may be awarded for up to one year and renewed for four additional one-year periods before a new solicitation is required.

Counting and Claiming

A vended meal contractor cannot conduct the following counting and claiming tasks:

- Determine if the meal served meets the meal pattern at the point of service (POS).

  The CE provides the meal pattern specifications to the vended meal contractor. The vended meal contractor supplies a meal as specified. However, it is the CE's responsibility to determine if the meal served is reimbursable.

- Code a meal as reimbursable in the POS system.

  The vended meal contractor may provide information to the CE about the number of meals prepared according to the contract specifications. However, the vended meal contractor cannot be held responsible for determining if a meal is reimbursable. It is the CE's responsibility to make that determination.

- Count and collect data for CE claims.

  The vended meal contractor may provide information to the CE about the number of meals prepared according to the contract specifications. However, the vended meal contractor cannot be held responsible for determining if a meal is reimbursable and the number of reimbursable meals served. It is the CE's responsibility to make that determination.

Meal Servers

A vended meal contractor may serve meals if the contract includes servers in the scope of work. Even with servers, the CE must continue to retain responsibility for operation and management of the program, including counting and claiming responsibilities. If the CE wants to add servers but the existing contract does not include them, this is considered a material change and a new solicitation is required.

USDA Foods

A vended meal contractor cannot receive direct delivery of USDA Foods. However, the CE can provide its USDA Foods to the vended meal contractor to incorporate into meals provided by the vendor. If this occurs, the CE must ensure that the vended meal contract provides documentation demonstrating the appropriate use of the USDA Foods and accounting for all USDA Foods provided to the vended meal contractor.

USDA regulation considers processing as the use of a commercial facility to repackage donated foods, or to use donated foods in the preparation of meals. As such, **a vended meal contractor that uses a commercial kitchen must meet program requirements to process USDA Foods and be considered a processor**. Information on processing USDA Foods is found in TDA's *USDA Foods Processor Handbook*.[31]

Credits, Rebates, Discounts, and USDA Foods Values

If there are any applicable credits, rebates, discounts, or USDA Foods values owed to the CE in this process, the vended meal provider must provide documentation that allows the CE to ensure that all amounts received are accurate.

Responsibility for Program Compliance

The CE cannot delegate its responsibility to operate and manage a program in compliance with all applicable federal, state, and local regulations to the vended meal contractor. If the activities in this contract include duties or actions that are program operation or management tasks, the CE must reevaluate its vendor solicitation and contract and either remove those duties or reissue a solicitation for an FSMC contract.

It is the CE's responsibility to ensure that the activities described in a vendor's contract are appropriate for this type of contract, that is, the activities do not involve program management.

Procuring a Vendor

A CE must procure a vendor's contract appropriately as described in *Administrator's Reference Manual, Section 17, Procurement*. In the solicitation and contract, the CE will include the following information and requirements at a minimum:

Scope of Work

- Specific description of the meals/food or beverage items the CE intends for the vendor to provide.
- Explanation and description of the meal pattern specifications that meals are to meet as well as types of meal options the CE wants the vendor to provide.
- Detailed information on how the food is to be delivered: packaging, containers, food safety requirements, etc.
- Description of the quality of food and beverage items the vendor is to provide.
- Description of the number of meals, food, or beverages to be delivered, the time(s) of delivery, and the location for deliver.
- Explanation of any equipment or facility support the CE will provide.
- Explanation of how or if the CE will approve substitutions.

[31] The USDA Foods Processor Handbook can be found on the *Food Distribution Program for Child Nutrition Programs* landing page on SquareMeals, under "Policy/Handbook."

- Explanation of how leftover meals are to be handled.
- Explanation of the type of documentation the CE will require the vendor to retain and the process for providing retained documentation to the CE on request and on a routine basis.
- Explanation of when and how the CE will notify the vendor if there is a change in the CEs standard order based on early release, field trips, or other changes to the students' regular schedule.

Financial Elements

- Explanation that the offer to be submitted is for a set price,[32] i.e., the offer must include a statement for the total costs for the contract.
- Process for submitting invoices, ensuring accuracy, and receiving payment.

Operational and Management Tasks

A vended meal contract is intended to provide a service to the CE, i.e., to support the CE's staff in performing operational and management tasks. A vended meal contractor cannot take on the role of day-to day operation or management the program, including, but not limited to, - maintaining facility food safety certifications and producing daily food production records.

If the CE is intending to procure services that include operational and management tasks, the CE must, instead, procure an FSMC contract. Any vended meal contract costs for providing operational and management services are unallowable costs to the nonprofit school food service account.

Terms and Conditions

The terms and conditions of the contract address general provisions, definitions for terminology, renewal options, protests, termination, and other standards inherent to the contract.

[NOTE: As a best practice, CE's may consider a provision stating that any silence, absence, or omission from the contract specifications must be regarded as meaning that only the best commercial practices are to prevail, and that only materials (food, supplies, etc.) and workmanship of a quality that would normally be specified by the CE is to be used. This provision should be contained in both the IFB/RFP and the contract.]

The terms and conditions for the contract must address, but are not limited to, the following issues:

- Process for addressing conflicts in the contract.
- Statement of the expected timeline for the contract duration.
- Length of the contract and options for renewal.
- Terms and conditions for terminating the contract.

[32] A vendor's contract cannot be awarded to an offeror that has submitted a cost-plus percentage or cost-plus added expenses. All costs to be charged for the contract must be included in the offer.

Awarding the Contract

The vended meal contract must be awarded to the contractor that is the most responsible and responsive to the solicitation with price as the primary consideration as described in the CE's written procurement procedures. See the *Administrator's Reference Manual, Section 17, Procurement* for more information on awarding the contract.

Responsibility for Program Compliance

The CE cannot delegate its responsibility to operate and manage program compliance with all applicable federal, state, and local regulations. The CE is responsible for ensuring that the activities described in a consultant's contract are appropriate for this type of contract, that is, the activities do not involve program management or program operation.

Records Retention

CEs must retain documentation about food production and service. All documentation or records must be kept on file for a minimum of five years for public and charter schools or three years for private schools, nonprofit organizations, and residential child care institutions after the end of the fiscal year to which they pertain.

When a CE engages an FSMC to manage its food service program, the CE must work with the FSMC to ensure that all required records are provided to the CE in a timely manner. It is the responsibility of the CE to ensure that all required records are retained and maintained for the period of time required.

CEs have the option to maintain records on paper or electronically. If the operational tasks are performed by the FSMC, the CE must still ensure that all required documentation is retained and made available to the CE. These records must be accessible to appropriate CE staff members and federal or state reviewers. TDA may request procurement documentation during both offsite and onsite administrative review processes as well as any additional review specific to procurement.

Information Box 4

Records Retention

Public and charter schools are required to keep documentation related to school nutrition programs for 5 years.

Private schools, other nonprofit organizations, and residential childcare institutions (RCCIs) are required to keep documentation for 3 years.

Procurement System

The CE must have documentation that demonstrates that CE has established internal controls to promote program integrity for food service contracts. This includes, but is not limited to, documentation that illustrates the following:

- Written procurement procedures, including, but not limited to, actions or tasks for cost analysis, selection of procurement method, ethical standards, and other requirements, as described in this section.
- Procedures for effective contract management.
- Verification of third-party entity compliance with procurement regulations, including the requirements listed in the *Buy American*, *Local Preference*, and *Other Regulatory Contract Requirement* subsections in this section.

See *Administrator's Reference Manual (ARM)* sections listed at the beginning of this section for additional information on documentation and procurement systems.

Documentation
Documentation includes, but is not limited to, the following:

- Written procedures and processes
- Documentation of the use of written procedures and processes, including, but not limited to, evidence of applying all contract award criteria for each method of procurement.
- Documents demonstrating that all costs paid through the nonprofit school food service account are allowable. If any unallowable costs are indicated on an invoice, the CE must provide documentation that those costs are paid with funds that do not come from the nonprofit school food service account.
- Documentation demonstrating that the CE has received all credits, rebates, discounts, and USDA Food values and that the funds have been assigned to the nonprofit school food service account.
- Documentation required specific to each Child Nutrition Program (CNP). This includes, but is not limited to, administrative costs for FFVP.
- Documentation identifying program and nonprogram food costs.
- Documentation demonstrating compliance with the Buy American provision and other contract inclusions as defined in regulation.
- Solicitations and awarded contracts, including evaluation tools.
- Documentation demonstrating compliance with operational requirements.
- Documentation demonstrating the CEs contract management practices.

For more information on the specific types of documentation that are required, see *Administrator's Reference Manual (ARM), Section 30, Records Retention*.

Compliance

TDA may take appropriate fiscal action or terminate the Food and Nutrition (FND) Agreement for any CE that is not in compliance with the requirements for all types of food service contracts. TDA will assess compliance with the related operational, accounting, procurement, and financial requirements based on the documentation that CE has submitted throughout the year as well as documentation submitted for offsite and onsite administrative review processes or other procurement review activities.

CEs must make available, upon request of the awarding agency (state or federal), any, or all of the documentation described in the *Records Retention* subsection in this section.

Obligation of the Contracting Entity (CE) to Report Fraud, Bribery, and Gratuity Violations

CE's must report, in writing to TDA, all violations of federal criminal law—fraud, bribery, or gratuity.

> The non-Federal entity or applicant for a Federal award must disclose, in a timely manner, in writing to the Federal awarding agency or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Failure to make required disclosures can result in any of the remedies described in§ 200.338 Remedies for noncompliance, including suspension or debarment. (2 CFR 200.113; 31 U.S.C. 3321).

Criminal Penalty

The maximum fine for embezzling, willfully misapplying, stealing, or obtaining by fraud, funds, assets, or property acquired under the National School Lunch Act or Child Nutrition Act is $25,000.

Fraud

> Whoever embezzles, willfully misapplies, steals or obtains by fraud any funds, assets or property provided under the National School Lunch Program and/or School Breakfast Program [and/or Special Milk Program] whether received directly or indirectly, shall, if such funds, assets or property are of a value of $100 or more, be fined no more than $25,000 or imprisoned not more than 5 years or both; or if such funds, assets or property are of a value of less than $100, be fined not more than $1,000 or imprisoned not more than 1 year or both. Whoever receives, conceals or retains for personal use or gain, funds, assets or property provided under the National School Lunch Program and/or School Breakfast Program, whether received directly or indirectly, knowing such funds, assets or property have been embezzled, willfully misapplied, stolen or obtained by fraud, shall be subject to the same penalties.

Termination of the Permanent Agreement for Financial Fraud or Misuse of Funds

If serious deficiencies, such as fraud or misuse of funds occur, and corrective action is not practical, TDA will terminate the CE's participation in the SNP. In this case, TDA may also refer the matter to the appropriate local, state, and/or federal authorities.